24/7/2014

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: A164/14

In the matter between

MALALA GEOPHREY LEDWABA	Applicant
and	
THE REGIONAL MAGISTRATE MR T P MUDAU	First Respondent
THE MINISTER OF JUSTICE AND	
CONSTITUTIONAL AFFAIRS	Second Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS,	
GAUTENG NORTH (PRETORIA)	Third Respondent

JUDGMENT

BAM J

1. The applicant is standing trial in a regional court, Pretoria, commonly known as the Special Commercial Crimes Court. The first respondent is the presiding regional court magistrate. On 5 February 2014 the applicant was convicted by the first respondent on 2 counts of fraud, (counts 3 and 4) and 4 counts of theft, (counts 11, 12, 13 and 14). The matter was then postponed for sentencing purposes. Subsequently the applicant however lodged a review application based on certain irregularities mainly allegedly committed by the first respondent. The relief sought by the applicant involves an order setting aside the proceedings and the consequent acquittal on all the charges of which the applicant was. The application is opposed by the third respondent. The first and second respondents abide this Court's decision.

2. During the trial the applicant, by profession an advocate, represented himself. In this court he is represented by Mr Geach SC.

3. The grounds for review are stated by the applicant in his founding affidavit as follows:

(i) The First Respondent's failure to carry out a legal duty created in terms of Section 186 of the Criminal Procedure Act, No 51 of 1977;

(ii) Unfair and improper conduct of the First Respondent in prejudging the issue of sentence;

(iii) Unfair and improper conduct of the First Respondent in discussing the matter with third parties and prejudging the issues on conviction; and

(iv) Failure of the First Respondent to ensure that the accused received a fair and impartial trial.

(Apparently concerning:)

(a) The conduct of prosecutors handling the trial before trial and an effort to conceal evidence; and-

(b) Failure by the State/NPA to disclose and or return a note book relevant to the charges.

4. It is trite that a review in any criminal matter should usually not be brought before the finalization of the matter, that is after sentence had been imposed. In the event of the accused being aggrieved by alleged irregularities, a review application may then be lodged and can even be combined with an appeal on the conviction and/or sentence. The latter procedure is usually recommended in circumstances where grounds of review are overlapping any grounds of appeal. However, in given circumstances, an accused person will be entitled to lodge a review application at any stage of a criminal trial. This may occur when serious irregularities were committed, prejudicing, *inter alia,* the accused's constitutional right to a fair trial. Each case has however to be considered on its own merits. The third respondent did not take issue whether this Court is empowered to entertain and consider such review application.

5. In this application the applicant bears the onus to show, on a balance of probabilities, that the alleged irregularities were in fact committed and that they were of such serious nature that it vitiated the proceedings.

6. There is no question that the first respondent was entitled, in terms of the provisions of section 186 of the Criminal Procedure Act, to call a witness after the closing of the accused's case and even after heads of argument were submitted by the State and the defence. This is in any event not in dispute. What the applicant is aggrieved about, and that is his first ground of review, is that the first respondent, after having stated that a specific witness' evidence would be required, in the interests of justice, before judgment could be delivered, failed to call that specific witness, although

present in court, to the stand. In this regard it is the applicant's contention that the first respondent had a legal duty to call the said witness, and, that the first respondent's subsequent revised decision, not to call the witness, was a gross irregularity vitiating the proceedings and meriting an order that the convictions of the applicant should be set aside.

7. In considering this ground of review the following aspects have to be taken into account.

•It seems to be common cause that the specific witness, apparently one Mr Joel Musimane Kgape (the witness' name is later on record spelled differently), identified by the first respondent to be called as a witness for the court, was mentioned by the applicant in his evidence. The accused referred to the said person as the person to whom he handed a certain amount of money, in regards to count 3. The witness was then duly subpoenaed on request by the first respondent and presented himself at court on 3 February 2014. It appears that the applicant, when he observed the witness, realised that the witness was not the person he had in mind when he testified.

•The applicant and the prosecutor then approached the first respondent in chambers and discussed the issue with him. Subsequently, upon returning to court, the first respondent, correctly in my view, recorded what had occurred in chambers. The applicant and the prosecutor agreed with the recorded events. The reason why the specific witness was not called is reflected in the applicant's recorded words, as follows:

Mr Ledwaba: *"Thank you, Your Worship. This morning I indicated to my colleague that I would request that the two of us . . . (indistinct) the Court in chambers. That is when after I saw Mr Joel Mosimanegape here"*

Court: *"Is that the gentleman I see seated behind the prosecutor?"*

Mr Ledwaba: *"Correct"*.

and

Court: *"Should I then accept it as a formal admission that this person, this gentleman, had nothing to do with the incident relating to count 3?*

Mr Ledwaba: *"Your Worship, if I can only put it that I always mismatched their names, I gave ... (intervenes)."*

Court: *"I am talking about this witness?"*

Mr Ledwaba: *"Yes, yes, no that I am prepared."*

Court: *"Can I then accept it formally?"*

Mr Ledwaba: *"Formally, yes."*

•The first respondent then stated that he repeatedly went through the evidence and concluded that he would in fact not need the evidence of the person concerned, and that he would be able to deliver judgment without the evidence

of that person. The first respondent then asked both the prosecutor and the applicant whether there would be any prejudice to any of the parties should the witness not testify. Both the applicant and the prosecutor agreed that there would have been no prejudice.

8. The applicant's first ground for review is based thereupon that the first respondent was in the circumstances obliged, and had a legal duty, to call Mr Joel Mosimanegape as a witness.
In regards to this contention, in the first place, it was discussed in court, and conceded by the applicant, that the said witness was not the witness to whom the applicant referred to in his evidence. The said witness was therefore clearly mistakenly identified and subpoenaed to come to court. There was no indication, or even a suggestion, that he would or could have contributed to the evidence at all. In his founding affidavit the applicant stated that a certain Colonel Anton Maseko's evidence *"will"* actually be *"essential"* in that regard. The applicant further indicated that he may anticipate to make application to lead further evidence in the appeal.
In the second place it clearly involves that the first respondent was not entitled to re-consider his initial decision to call the witness. It must be kept in mind that the power of a presiding officer to call a witness is discretionary. There is therefore no reason why a presiding officer may not reconsider the evidence at any stage before judgment. In my view a presiding officer is at all relevant times before judgment entitled to consider, and re-consider, the evidence. It may even happen during judgment. The first respondent clearly stated that he in fact reconsidered the evidence and upon reflection changed his mind about the necessity to call the witness. There is no indication that Mr Musimanegape's evidence was indeed necessary or required to enable the first respondent to deliver judgment. Accordingly the applicant's reliance on the judgment of *Director of Public Prosecutions, Transvaal v Mtsweni 2007(2) SACR 217 SCA,* is misplaced.

9. It follows that the applicant's contention that the first respondent was in the circumstances obliged to call Mr Musimanegape to the witness stand is without substance and stands to be rejected.

10. Mr Geach's alternative argument that the first respondent was in the circumstances obliged to call Colonel Anton Maseko, the person who was subsequently identified by the applicant to be the correct witness, is without substance. Firstly it was not the applicant's case on the papers and secondly it was clear that the first respondent has finally decided that he could deliver judgment without the evidence of the witness concerned in respect of count 3.

11. The applicant's averment that the first respondent based his convictions on *"non-existing evidence"*, is not a so called irregularity. The applicant's contention that the first respondent acted *"irregularly"* in this regard, is not substantiated. It is in any event an aspect that could be addressed during a possible appeal. Mr Geach has confirmed that the applicant intends to appeal the convictions.

12. The applicant's allegation that the first respondent pre-judged the issue of sentence by remarking after conviction, at the time the applicant's bail was extended, that he would not sentence the applicant to jail *"for now"*, is evenly without merit. Mr Geach's submission that the first respondent has indicated therewith that he intended to impose a custodial sentence is without substance. The said allegation by the applicant is in any event, in my view, also pre-mature in view of the fact that the applicant has not yet been sentenced.

13. The applicant's allegations that the first respondent *"interacted"* with attorney Mkhabela in respect of this case, is emphatically denied by both persons. It is remarkable that the applicant firstly averred that Mr Mkhabela would have endeavoured to influence the first respondent with a good word in favour of the applicant. This flies in the face of the applicant's later contention that the first respondent was before conviction influenced by Mr Mkhabela against the applicant. It is further remarkable that the applicant also complained about unsubstantiated *"improper discussions"* between Mr Mkhabela and State Advocate Nkula-Nyoni.

14. In respect of the alleged discussion between the first respondent and Mr Mkhabela the applicant included an electronically clandestinely recorded conversation he had with Mr Mkhabela concerning that issue. Although it is conceded by the third respondent that Mr Mkhabela, upon the latters' admission on the said recorded conversation, that Mr Mkhabela could have mentioned the applicant's case when he conversed with the first respondent, there is no indication that the first respondent was at all influenced by Mr Mkhabela. It was pointed out by Mr Janse van Rensburg, that both the first respondent and Mr Mkhabela stated under oath that they had no conversation concerning the applicant. Why Mr Mkhabela told the applicant that he did talk with the first respondent about his case is unexplained. In view of the first respondent's specific denial under oath of such conversation, it is in my view extremely doubtful whether such conversation indeed took place. Accordingly the applicant's allegations, including the implication that the first respondent was influenced by Mr Mkhabela not to call Mr Musimanegape to the stand, in my opinion, are clearly unfounded and nothing but unmerited conjecture.

15. The applicant's point that he did not receive a fair trial due to alleged conduct of representatives of the third respondent apparently partly turns upon certain information the applicant sought which the prosecutor at the time stated she did not have. This issue is clearly frivolous and is something that may also be considered during an appeal on the merits. If it appears that it may have a direct influence on admissibility of certain evidence it can be addressed in context during the prospective appeal.

16. The *"evidence"* of Colonel Anton Maseko, is clearly not evidence on record. The applicant's remedy in this regard may be an application in terms of the provisions of section 309(3), read with section 304(2), of the Criminal Procedure Act, to adduce that evidence during an appeal. If that application succeeds the Court on appeal may consider the evidential value of such evidence in context. It is not the function of this Court to consider the possible evidential value the evidence, including the contents of the affidavit of Colonel Maseko.

17. Mr Geach's submission that the conviction on count 3 should be set aside and the first respondent be ordered to accept the evidence of Colonel Maseko before considering the evidence on that specific charge again, is in the circumstances without merit. The first respondent has clearly stated that he had considered all the relevant evidence before judgment was delivered. As pointed out above the applicant, in any event, still has the remedy to make application to adduce new evidence at the time of the prospective appeal.

18. Accordingly, in my opinion the review application cannot succeed and the following order should be made:

The applicant's application for review is dismissed.

A J BAM JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

F G PRELLER JUDGE OF THE HIGH COURT
24 July 2014

APPEARANCES:

For the applicant: Adv B Geach SC

For Third Respondent: Adv A Janse van Rensburg